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No. 02 1038

Supreme Court, U.S.
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In the

Supreme Court of the United States

SALVATORE A. BONO,

Petitioner,

v.

GEOFFREY M. PARKINSON and THE LAURA J. NILES FOUNDATION, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF FOR PETITIONER

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STATEMENT OF THE CASE

Bono adequately set forth the pertinent facts in his statement of the case in the petition for certiorari. However, he cannot permit some of the statements set forth in the respondents' statement of the case to remain unchallenged:

- Judge Seybolt's decision to enter a default against Bono was not based upon a full year of allegedly abusive litigation conduct (brief in opposition p. 4). The motion for a default, of which Bono had no notice, complained only of Bono's alleged failure to appear at a continuing deposition.

- The respondents' assertion that Judge Seybolt selected Mr. Selvaggi as guardian ad litem is demonstrably false, as the order to show cause they refer to (Pa2a) has Mr. Selvaggi's name typed in - he was thus clearly selected by Parkinson's attorney, not the lower court.

In addition, the respondents' brief in opposition does not controvert that Judge Seybolt continued to sit on the case after taking an adverse position against Bono in a related litigation.

REASONS FOR GRANTING THE WRIT

Rather than address the serious constitutional issues raised by Bono's petition, the respondents rest their opposition to this Court's review of the New Jersey judgment on procedural technicalities. This Court should reject these specious arguments, accept review, and address Bono's due process claims on the merits. Contrary to the respondents' assertions, the judgment is final for purposes of review in this Court because the federal issues were conclusively determined,

the issues raised by the petition were properly preserved according to New Jersey law, and the issues are of great significance.

POINT I **BECAUSE THE SUPREME COURT OF NEW JERSEY HAS DENIED REVIEW WITH RESPECT TO THE FEDERAL ISSUES RAISED BY BONO, AND ANY MATTER REMAINING UNRESOLVED IN THE NEW JERSEY STATE COURTS CANNOT AFFECT THE FEDERAL ISSUES, THE APPEAL IS RIPE FOR REVIEW BY THIS COURT.**

(Responding to Point C of the respondent's brief in opposition).

This Court has held that it will review state court judgments even if the state court judgment remanded the matter for trial, if the federal issues have been conclusively decided and there is no chance that the remand will raise any additional federal issues. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975). Contrary to position asserted by the respondents (brief in opposition p. 11), the judgment is final for purposes of appeal to this Court. In arguing otherwise, the respondents state general principles of law as to finality without acknowledging the exceptions established by this Court. The present case falls within the exception for situations in which the federal claims sought to be reviewed in the Supreme Court will not be further reviewed by the state court.

A. The Appeal in the New York State Courts Is No Longer Pending.

The respondents argue that there are two pending state court proceedings, (1) the respondents' appeal to the New Jersey Supreme Court, and (2) Bono's appeal in the New York courts of the docketing of the New Jersey judgment in New

York. (brief in opposition pp. 6-7, 11). The latter appeal was decided by the New York State Supreme Court, Appellate Division on December 30, 2002. *Parkinson v. Bono*, __ A.D.2d ___, 751 N.Y.S.2d 884 (N.Y. App. Div. 2002). Bono has not sought leave to appeal this order to the New York Court of Appeals. That proceeding has been finally determined.[1]

B. The Respondents' Appeal to the New Jersey Supreme Court on an Unrelated State-law Issue Does Not Render the Judgment Non-final for Purposes of Bono's Request for Review in this Court.

As for the New Jersey proceedings, the only issues that remain on appeal to the New Jersey Supreme Court are state-law issues concerning the authority to grant attorney's fees in an action for an accounting, and the propriety of the amount of the fee award in this case. The question of fees have nothing to do with the question of whether a litigant is entitled to litigate before an unbiased tribunal.

The respondents arrive at their erroneous conclusion that this Court lacks jurisdiction to hear the appeal because they fail to distinguish between the petitioner's appeal below

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[1] Bono must also take issue with the respondents' characterization of his appeal in New York. He did not appeal the amount of the New Jersey judgment (brief in opposition p. 11), but challenged the authority of the Kings County clerk to enter a foreign state judgment that was not clear on its face, and he also challenged the authority of the court to amend the judgment by increasing it nearly 50%.

and their own appeal to the New Jersey Supreme Court. Only Bono and Niles raised federal questions on appeal before the New Jersey state courts. Parkinson and the Foundation raised only state-law issues concerning the alleged inadequacy of the damages award. The New Jersey Appellate Division affirmed the Superior Court's judgment in toto. With respect to the respondents' cross-appeals concerning the alleged inadequacy of the damages, it deferred to the trial court's "feel for the case. " (A. 75). As even the respondents concede, the New Jersey Supreme Court denied Bono's petition for certification - it determined that it would not review the federal claims Bono now advances before this Court. The door to review of the federal claims in the New Jersey courts was shut when that state's highest court denied Bono's petition for certification. The New Jersey Supreme Court granted certification to the respondents, who raised only the issue of the adequacy of the compensatory damages.

By failing to distinguish between the federal claims asserted by Bono and their own claims which arise solely from state law, the respondents ignore a well-established line of cases that treat state court orders as final when no additional federal claims can be reviewed in state court. In *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945), a Nebraska fraternal organization created to own a radio station leased the station to a corporation. They jointly applied to the Federal Communications Commission for consent to transfer the station license. A member of the fraternal organization sued, alleging the lease and assignment of the license should be set aside as fraudulent. *Johnson* at 121. The FCC consented to the transfer. The trial court found no fraud and dismissed the suit. The Nebraska Supreme Court reversed, directed that the license and lease be set aside, and that the parties be restored to their original positions. *Johnson*, 326 U.S. at 122. On

motion for hearing, the station and the fraternal organization argued that the state courts had no jurisdiction to overrule the FCC's consent to the transfer. When the Nebraska Supreme Court denied the motion, the station and the organization filed a petition for certiorari. This Court held that the order was final because all that remained in the state court was an accounting, which could not give rise to a federal claim. *Johnson* at 127.

Acceptance of jurisdiction by this Court advances, rather than impedes, the efficient use of judicial resources. The basis for the rule against reviewing interlocutory judgments is to prevent piecemeal litigation to this Court. *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973). This is not implicated in this case. This Court could reverse the judgment, holding it infirm under the Due Process Clause. In that event, the appeal to the New Jersey Supreme Court on the issue of damages would be rendered moot. If this Court affirms the entry of the judgment, the New Jersey Supreme Court will simply decide the appeal before it concerning damages. This Court may only review a state court judgment if a federal question is raised. 28 U.S.C. § 1257(a). Review of Bono's claim will not impact the grounds for the finality rule. Following *Johnson*, this Court reaffirmed this principal of jurisdiction in *North Dakota State Board, supra*. In that case, the North Dakota Supreme Court held that a statute which required that if a corporation applies to operate a pharmacy, the majority of the stock must be owned by registered pharmacists in good standing. *Id.* at158. The Nebraska Supreme Court remanded the matter to the State Board for a determination of the application. This Court held that the judgment was final notwithstanding the remand because even if the respondent was denied a license upon remand, that denial would be strictly on state grounds, and could not be further reviewed to the Supreme Court.

This Court has held that when a state's highest court rejects a challenge to the constitutionality of a statute and remands for a determination of damages, the judgment with respect to the constitutionality is final for purposes of appeal to this Court. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 246 (1974). The present case invokes the same posture because the New Jersey Supreme Court, by denying Bono's petition for certification, upheld the constitutionality of the judgment. The only issue remaining as the result of the New Jersey Supreme Court's grant of certification to Parkinson and the Foundation is damages. Therefore, the petition should not be denied on the grounds of alleged lack of finality.

The cases relied upon by the respondents (brief in opposition p. 11) are inapposite. In *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75 (1997), the state Supreme Court issued an interlocutory decision answering one certified question as to whether punitive damages were recoverable in a wrongful death action where the complaint also asserted claims under 42 U.S.C. § 1983, under which punitive damages against a municipality are not recoverable. *Id.*, at 81. The Court dismissed the petition for writ of certiorari on the grounds that the state court judgment was not final. Unlike the present situation where only state law issues remain and those issues cannot affect the resolution of the federal issues, the resolution of the state-law claims in *Jefferson* has the potential to moot the federal claims. *Jefferson* at 82. The respondents also cite to *North Dakota State Board*, where, as discussed above, this Court actually accepted jurisdiction, rejecting a challenge that the judgment was not final.

In *Collins v. Miller*, 252 U.S. 364, 367 (1920) (brief in opposition p. 11), unlike the present case, the lower court order

left federal issues to be resolved. *Collins* concerned an appeal from the denial of a portion of a petition for a writ of habeas corpus. The petition in *Collins* had been brought to review multiple criminal charges. The Court held that the judgment was not final because the matter had been remanded with respect to some of the charges. Unlike the present case, what was left to be decided in *Collins* were the very federal issues that gave rise to the petition for writ of habeas corpus in the first place, albeit on only some of the original charges. Finally, *Department of Banking, State of Nebraska v. Pink*, 317 U.S. 264 (1942) (brief in opposition p. 11) held only that an application to clarify a state court judgment does not toll the time to file a petition for a writ of certiorari. *Id.*, at 268. *Pink* is inapplicable because there is no dispute that Bono timely filed his petition with this Court.

The respondents should not be permitted to succeed on their argument that their own appeal of the New Jersey Appellate Division order on the issue of damages must delay Bono's right to seek review in this Court. Because the respondents' appeal to the New Jersey Supreme Court concerns only state law issues, the judgment is final for purposes of review in this Court.

POINT II **BONO'S CLAIMS ARE RIPE FOR REVIEW IN THIS COURT.**

(Responding to Point A of the brief in opposition).

The respondents misrepresent the facts and the law when they argue that this Court may not review Bono's claims because they were allegedly not presented to the state courts. This Court's precedent requires no more than that a petitioner present claims in the manner required by state law. Under

New Jersey law, Appellate Courts will reach issues raised for the first time on appeal if the issue is one of great public importance. Bono's due process claims raise arguments of great public importance concerning the right to notice and the opportunity to be heard by an impartial magistrate such that it was entirely possible to raise them with more particularity for the first time in the New Jersey Supreme Court. In any event, Bono's briefs before the Appellate Division and the petition for certification to the Supreme Court addressed the due process claims Bono now seeks to raise before this Court.

A. Bono Presented the Claims in the Manner Provided for by New Jersey Law Because New Jersey Appellate Courts Will Review Issues Raised for the First Time on Appeal If They Are of Great Public Importance.

A claim is properly raised in a state court for purposes of review by this Court if it is raised in the time and manner provided for under state law. *Adams v. Robertson*, 520 U.S. 83, 87 (1997), *citing Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988). Under New Jersey law, appellate courts will in fact review claims raised for the first time on appeal if the issue presented is of sufficient public concern. *Alan J. Cornblatt, P.A. v. Barow*, 153 N.J. 218, 230, 708 A.2d 401, 407 (1998); *Nieder v. Royal Indmnity Ins. Co.*, 62 N.J. 229, 233, 300 A.2d 142, 145 (1973). The issue of whether a judge may wear two hats - litigant and arbiter, is of great importance to the integrity of the judicial system. The New Jersey courts therefore had the power to review these issues, and by extension, so does this Court.

B. The Briefs Before the Appellate Division and the Petition for Certification to the New Jersey Supreme Court Sufficiently Apprised the Respondents of the Due Process Claims.

In any event, the briefs in the Appellate Division and the Supreme Court petition for certification sufficiently placed the court and the adversaries on notice that Bono was raising a federal due process claim. The Court must look to the overall gist of the briefs in determining whether the claims of lack of notice and judicial impartiality were described in the papers before the New Jersey state courts. *Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988) (manner in which the petitioner's Sixth Amendment claim was asserted in the state court made it appropriate for the Supreme Court to accept jurisdiction even though no explicit Sixth Amendment or constitutional issue was raised in the state courts.) Here, the tenor of Bono's state court briefs demonstrate that he was identifying and raising a claim under the due process clause of the fourteenth amendment.

1. The Claim That Judge Seybolt Violated Bono's Due Process Rights by Ignoring Various Procedural Rules Was Preserved.

Bono's briefs before the Appellate Division indicate that Bono claimed that the cumulative effects of the trial judge's rulings deprived him of a his fundamental right to a fair trial, i..e, his due process rights. Among these errors was the short notice prior to holding Bono in default, the refusal to permit Bono to participate in the damages phase of the trial, and Judge Seybolt's decision to continue to sit on the case after taking an active role in a separate litigation against Bono.

Furthermore, Point II of the petition for writ of certiorari argues that this Court should review the judgment to address whether a litigant's due process rights are violated when a trial judge repeatedly ignores state procedures and rules designed to afford litigants a fair opportunity to present and defend claims. Among the procedural defects identified in the petition to this Court were Judge Seybolt's entry of a default on short notice and Bono's lack of notice that he would be subject to surcharge. (Petition pp. 25-29). These same issues were succinctly raised at Point V of Bono's appellant's brief to the New Jersey Appellate Division. There, Bono alleged that the trial court deprived Bono of his due process rights as the result of the entry of the default on short notice and the refusal to permit Bono to participate in the damages phase of the trial. The point heading itself raises a due process claim:

> The decision to enter default without proper notice, as required by rule 1:6-3, the failure to consider less drastic remedies, and the total exclusion of bono and his attorney from any participation in the proofs hearing and damages hearing, *violate his due process rights* and his rights under New Jersey law and require reversal.

(Appellant's brief to Appellate Division, Point V) (emphasis added). Subdivision B of Bono's principal brief to the Appellate Division further delineates Bono's due process argument. (Bono brief to Appellate Division).

Bono continued to press the due process arguments in his petition for certification to the New Jersey Supreme Court. Point III of his petition to that court argued he should be granted certification because by allowing a judgment to be

entered for relief not sought in the complaint, based upon short notice, without participation of the defendant, violated due process. (Petition for certification p. 13). The argument under this point heading decries the fact that, were the Appellate Division's rationale to be accepted, a defaulting party will be subject to damages without notice, violating due process. Because Bono's brief addressed the question of whether the lack of notice and opportunity to be heard before entering a default judgment against Bono violated his due process rights, the issue is ripe for review in this Court.

2. The Claim That Judge Seybolt Violated Bono's Due Process Rights by Refusing to Recuse Himself Was Preserved.

The claim that Judge Seybolt's failure to recuse himself deprived Bono of his right to due process was also raised in the New Jersey courts. The conclusion paragraph of Bono's brief to the Appellate Division argues that the cumulative effect of the trial judge's errors including Judge Seybolt's refusal to recuse himself, violated Bono's due process rights:

> Bono was deprived of the fundamental protections of due process and his substantive rights at every phase of the proceeding and a double standard was applied by the court to the detriment of Bono . . . Finally, Judge Seybolt made many of these extreme rulings after he became a defendant in a Federal lawsuit brought by Bono against him and the other parties to this litigation and the Judge was litigating against Bono in that related case. Because of the appearance of bias, Judge

Seybolt was required to but refused to recuse himself.
(Bono brief to Appellate Division).

In his petition for certification to the Supreme Court of New Jersey, Bono asserted that "[c]ertification should be granted in this case because the Appellate Division's decision results in the violation of a litigant's due process rights, ..." (Petition for certification p. 7). Bono's petition for certification further asserted that "a court's impartiality is the very bedrock of constitutional due process, ..." (Petition for certification p. 9).

Bono's arguments to this Court concerning the violation of due process are the same arguments he made before the Appellate Division and the Supreme Court. Because Bono made these arguments before the New Jersey courts, they were preserved for review by this Court.

C. Because the Appellate Division Issued a Summary Order Without Discussion, it Cannot Be Said That the Failure to Address the Due Process Claims in the Order Meant That They Were Not Raised, and in Any Event, Bono Rebutted the Presumption.

Unable to rely upon what the papers in the courts below actually said to support their assertion that these issues were not preserved, the respondents argue that the issues were not raised because they were not addressed by the Appellate Division. (brief in opposition p. 8). But the Appellate Division specifically stated in its opinion that it did not believe Bono's claims merited extensive discussion in a written opinion, invoking N.J. Ct. R. 2:1-3(E). (A. 65). The

Appellate Division, therefore, failed to mention the due process claims, not because Bono did not raise them, but because the Appellate Division believed that they had no merit. This cannot form the basis for a claim of lack of preservation.

In any event, as this Court stated in *Adams*, even if the state court does not mention the federal issue, the petitioner can rebut the presumption by establishing that it was properly presented. *Adams*, 520 U.S. at 87. That the petitioner in *Adams* did not meet this burden does not require a finding that Bono has not met it. Here, Bono's appellant's brief and petition for certification raised the issues sought to be reviewed in this Court.

POINT III **CONTRARY TO THE RESPONDENTS' CLAIMS, THE ISSUES IN THIS CASE ARE SUBSTANTIAL AND WORTHY OF THIS COURT'S REVIEW, REGARDLESS OF WHETHER THE APPELLATE DIVISION'S ORDER WAS UNPUBLISHED.** (Responding to point B of the brief in opposition).

Contrary to the respondent's contention, the fact that the Appellate Division declined to publish its opinion affirming the judgment does not mean that the issues in this case are unimportant, or are not worthy of this Court's review. *Easley v. Cromartie*, 532 U.S. 234 (2001) (brief in opposition p. 10) is inapposite. The Court in *Easley*, after making the general statement that appellate courts will not lightly overturn factual findings, did make new findings. *Easley* at 243. In any event, Bono is not asking this court to overturn factual findings. There is no dispute about the facts insofar as relevant to the issues sought to be reviewed. There is no dispute that

Judge Seybolt denied Bono's application to recuse himself after his counsel filed pleadings in the federal action taking a position concerning Bono's federal conduct. There is also no factual dispute that Parkinson's motion for a default judgment was faxed to Bono's counsel the day before the return date of the motion.

Bono's petition to this Court raised issues that go to the very heart of the judicial process, including the integrity of judicial proceedings and the right of a party to have ample notice in order to present defenses to claims. Regardless of whether the Appellate Division decision has precedential value under New Jersey rules, Bono's due process claims are of interest to more than himself. This Court has previously granted petitions for certiorari on appeals from unpublished opinions. Earlier this month, the Court decided *Ewing v. California*, ___ U.S. _____, 123 S.Ct. 1179 (March 5, 2003) on petition for a writ of certiorari to the California Court of Appeal. The procedural posture of this case is identical to *Ewing*. In *Ewing*, the petitioner's conviction was affirmed by the California Court of Appeal (like the New Jersey Appellate Division, an intermediate appellate court) in an unpublished opinion. *Ewing* at 1185. California, like New Jersey, has a rule precluding citation to unpublished opinions other than for the purpose of res judicata, collateral estoppel, or law of the case. Cal. Rule of Court 977. The California Supreme Court denied Ewing's petition for review, just as the New Jersey Supreme Court denied Bono's petition for certification. *Ewing* at 1185. Despite the fact that the appeal was from an unpublished opinion, this Court granted certiorari because of the importance of the Eighth Amendment issue involved. 535 U.S. 969 (2002). *See also Clark County School District v. Breeden*, 532 U.S. 268 (2001) (Court granted certiorari to review unpublished decision of the United States Court of

Appeals for the Ninth Circuit). If, as the respondents claim, this Court should not determine any issue decided in an unpublished order, numerous important issues will escape review. Most state and federal courts have rules regarding the precedential effect of unpublished opinions. Under the respondents' theory, these cases would never be subject to this Court's review. There is no authority for the proposition that this Court cannot review unpublished orders.

Moreover, the respondents' claim rings hollow when they themselves sought review of this allegedly unimportant, unpublished opinion in the New Jersey Supreme Court. Apparently, to the respondents' hypocritical way of thinking, the unpublished Appellate Division order is important enough to be reviewed by the New Jersey Supreme Court - on an issue decided adversely to them - but not important enough to justify review in this Court on the issue that was decided in their favor.

A litigant's right to have a case decided by an impartial magistrate is fundamental. So is the concept that a party may not be subject to damages without notice and an opportunity to be heard. The fact that the Appellate Division decided not to publish its opinion does not preclude this Court from reviewing the order to decide the due process ramifications of a trial judge's refusal to grant recusal after affirmatively taking a position against the litigant in another proceeding, as well as whether entering a judgment on default on short notice, for relief not sought in the complaint, and after refusing to permit participation in the damages portion of the hearing violated due process. The integrity of the judicial process is at stake. No judicial system can survive if the arbiters are viewed as biased or are in fact biased. Regardless of whether the Appellate Division order may be cited as precedent, the due

process issues raised by this appeal are of concern to litigants throughout the nation. This Court should grant the petition and decide these issues.

CONCLUSION

Bono was deprived of fundamental protections of due process and his substantive rights at every stage of the proceedings in state court, and this court should grant review to address these issues. The federal issues were conclusively resolved by the state court, and the respondents' allegations of lack of finality is no bar to review. The issues were sufficiently raised by Bono in the state court, and they are sufficiently important to merit review. The Petition for a Writ of Certiorari should therefore be granted.

Dated: March 19, 2003

Respectfully submitted,

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